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NO. 07-319

IN THE
Supreme Court of the United States

WENDY JANE TITELMAN,
Petitioner,

v.

ANDREW CHARLES TITELMAN,
Respondent.

On Writ of Certiorari to the
Supreme Court of Georgia

AMICI, THE PROTECTIVE MOTHERS ALLIANCE FOR JUSTICE, STOP FAMILY VIOLENCE, AND BATTERED MOTHERS CUSTODY CONFERENCE, MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Amici respectfully move this Court for permission to file the following *Amicus Curiae* Brief. As required by Rule 37(2), consent of all parties was requested and notice was given at least 10 days prior to the due date of the *amici curiae's* intention of filing this brief. Petitioner has consented to the filing of this brief, and Respondent does not consent. Reply letters from counsel for each party are filed with the Clerk.

The *Amici* represented herein have sufficient interest and good reason for presenting an amicus brief. *Amici* further submit that the facts presented in the brief will add relevant information and may be of considerable help and aid to the Court in its consideration of the constitutional issue.

Therefore, Amici pray that the Court grant this motion for leave to file *Amicus Curiae* Brief.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*[1]

The Protective Mothers Alliance for Justice mission is to bring justice across the United States to mothers who have been battered or whose children have been abused by the father and who now must confront the father in legal proceedings regarding custody or visitation. Our objectives are to expose current miscarriages of justice, and to build public pressure on courts to make reforms, specifically, reforms that will make courts work in fair and objective ways in these kinds of legal proceedings, will hold courts accountable, and will require courts to protect children from being abused. We strive to prohibit the punishment of mothers for efforts to protect their children. The most common punishment currently is the transfer of custody of the children to the abusive father, but some mothers are also being fined or jailed.

We consider this issue of the utmost urgency. Not only are thousands of children per year being endangered or harmed by such judicial actions, countless additional children are being put at risk because their mothers become afraid to take steps

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[1] Pursuant to this Court's Rule 37.6, *amici curiae* represent that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

to protect them once they become aware of the retaliatory actions by courts against mothers.

Stop Family Violence (SFV) is a project of the Tides Center, a 501(c)(3) non profit located in San Francisco, CA. SFV is a grassroots activist organization that works to ensure safety, justice, accountability and healing for people whose lives are affected by violent relationships. Stop Family Violence's mission is to organize and amplify our nation's collective voice against family violence.

We urge you to grant the petition for writ. Stop Family Violence is contacted by an average of three mothers each week who have lost child custody to fathers who abuse the mother and/or the children. We know of several situations where protective mothers have been jailed for speaking out against the court's actions in an effort to protect their children; of numerous others who have been gagged and forbidden to speak about the abuse under threat of incarceration. We know of numerous situations where protective mothers have been coerced into signing stipulated agreements against their children's interests under threat of incarceration or full loss of custody. We know of countless situations where children have been removed from the protective parent by *ex parte* proceedings, with blatant disregard for due process. This is a widespread national problem for which there has been insufficient concern or remedy.

In a few counties of Illinois, alone, the Illinois Coalition for Family Court Reform (ICFCR) has documented more than 225 cases where custody

was awarded to abusive husbands/fathers. Ms. Titelman's case fits the pattern of practice, lack of due process, and violation of constitutional rights and civil rights that we are experiencing in Illinois, and across the country.

The Battered Mothers Custody Conference purpose is to draw public and media attention to the bias and injustice faced by battered women and their children in the family court system in this nation; to enlighten court personnel, legislators, government agencies, and policy makers about these realities and to press for change; to educate professionals; and to facilitate communication and collaboration among experts, scholars, professionals, advocates, and lay persons who work on behalf of battered mothers and their children.

The features of the Titelman case are prototypical of the cases to which the Battered Mothers Custody Conference is directed, cases in which battered women, in their attempts to gain legal protections for themselves and their children, are penalized by the family court/divorce court systems for raising allegations of intimate partner abuse or child abuse. In many cases, including the Titelman case, these penalties are as severe as being deprived of all meaningful contact with their children.

SUMMARY OF ARGUMENT

Because of persistent discrimination against women in the courts, especially battered women and in cases where allegations are made of sexual

abuse of children, a pattern and practice exists in the family courts of the United States of denying the constitutionally protected rights of due process, equal protection and parenting. Such discrimination is not limited to the instant case but is widespread and long-term across the States. The pattern robs thousands of protective parents of contact with their children and their constitutionally protected rights. Even more painfully, the practice puts thousands of children directly in harms way by forcing them into the custody of the very person who abused them.

Amici urge the Court to grant certiorari on this case to hear it on its merits because of the serious, pervasive and longstanding legal issues and the ultimate impact on protective parents and children affecting their health and their lives.

ARGUMENT

I. BIAS AGAINST WOMEN IN THE COURTS ESPECIALLY RELATED TO CHILD CUSTODY JUDICIAL DETERMINATIONS VIOLATES EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT, DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND THE FUNDAMENTAL CONSTITUTIONALLY PROTECTED RIGHT OF PARENTING.

The violation of constitutionally protected due process and equal protection as well as the fundamental right of parenting is not an isolated phenomena in this country. It is in fact a national

tragedy that has gone unremedied for at least 30 years. Especially in situations as this petitioner, when there is proof of sexual abuse against the children, the mother's rights and most importantly the children's protection are ignored.

A. Gender bias exists in the court.[2]

Since the 1990's, a series of gender bias studies were done around the country. The findings of the thirty-one state and five federal task forces that have reported over the last fifteen years are similar and disturbing. They report that gender bias in the courts does sometimes affect men, but that its victims are overwhelmingly women; that male judges and lawyers of all ages are largely unaware of the experiences and perceptions of their female colleagues; and that the disrespect and devaluation experienced by white women is even more pronounced for women of color. In the words of the New York Task Force on Women in the Courts, "Gender bias against women litigants, lawyers and court employees is a pervasive problem with grave consequences. Women are often denied equal justice, equal treatment and equal opportunity." There is a growing tendency to award custody to the wealthier parent rather than to award child support. Given women's and men's unequal earning power, this constitutes a paternal preference. There is also significant indifference to spouse abuse in custody cases. Many judges do not understand why a man who beats his wife but not

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[2] National Judicial Education Project, Gender Bias Task Forces: Findings & Recommendations, 2006.

his child should not be awarded custody, and erroneously assume that husbands' violence against their wives ends with divorce. Judges sometimes assume that women are making false allegations of child sexual abuse to gain an advantage in custody disputes.

Domestic violence continues to be an area in which women experience significant bias, despite major statutory reforms to provide them with civil and criminal protections. Courts show little understanding of the circumstances under which battered women survive and the ways in which the dynamics of violence, economic dependence, lack of support from family and community, and fear of the batterer combine to keep women in these situations.

The gender bias task forces' documentation of state courts' failure to treat gender-based violence seriously was the basis for a 1991 Senate report recommending adoption of the Violence Against Women Act, which treats these crimes as a civil rights violation. Pointing to the "sad fact" that "law reform has failed to eradicate the stereotypes that drive the system to treat these crimes against women differently from other crimes," the Senate acknowledged the need for a federal remedy for women victims. [S. Rep. No. 102-197, at 47-48 (1991)].[3] Unfortunately, the civil rights remedy for

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[3] National Judicial Education Project, Gender Bias Task Forces: Findings & Recommendations, 2006.

battered women was declared unconstitutional by the Supreme Court. [4]

B. Discrimination against victims of domestic violence and sex abuse in custody decisions disproportionately impacts women.

Domestic violence is a factor in 50-80% of divorce cases in the U.S., depending on the jurisdiction.[5] The victims of domestic violence are overwhelmingly women and children, approximately 95%.[6] Therefore, practices in the divorce courts disproportionately impact women, especially battered women. In addition, a high correlation has been shown between spouse abuse, child abuse and incest[7] putting at risk the children of these battered women. Nor is child sexual abuse rare in the U.S. "The Honorable David Paterson, a state senator from New York, testified that one of every three young girls and one of every five boys become victims of child sexual abuse and that a

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[4] *U.S. v. Morrison*, 529 U.S. 598 (2000).

[5] Divorce Mediation and Domestic Violence, *Domestic Violence Report* (Civic Research, Inc. Kingston, N.J., Oct/Nov. 1998), at 1.

[6] Jaffe, P.G, Wolfe, D., & Wilson, S., *Children of Battered Women*. Newbury Park, CA: Sage, 1990.

[7] American Bar Association, Young Lawyer's Division, Center for Child Advocacy and Protection, *Legal Response: Child Advocacy and Protection*, No. 2, P. 1 (June-July 1979); Roy, A Current Study of 150 Cases, *Battered Women: A Psychological Study of Domestic Violence* (1979).

high percentage of those most afflicted repeat the cycle." [8]

As early as the 1960s, when fathers asked for custody of the children, they won 70% of the time. Fifty-nine percent of the judicially successful fathers and 50% of the privately successful fathers had physically abused their wives or initiated a violent divorce. Fathers who kidnapped their children were not punished while 80% of women who did were imprisoned, fined or custodially punished. Having more money was one of the factors that allowed fathers to win but 62% of the fathers used violence to win custody. Courts then rubber stamped this behavior. These fathers had not been any more involved in child care or housework than any other father. The standard for evaluating mothers and fathers was very different.[9]

Pursuant to the National Institute of Justice Grant number 2000-WT-VT-0016 entitled "History of Intimate Partner Violence and the Determination of Custody and Visitation among Couples Petitioning for Dissolution of Marriage" many academic studies were done and the results published in Violence Against Women, No. 11,

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[8] *EXPOSE The Failure of Family Courts to Protect Children from Abuse in Custody Disputes: A Resource Book for Lawmakers, Judges, Attorneys and Mental health Professionals*, Our Children Our Future Charitable Foundation, Los Gatos, CA, 1999, p. 201.

[9] Chesler, Phyllis, *Mothers on Trial The Battle for Children and Custody*, McGraw-Hill Book Company, NY. 1986.

Volume 8, Sage, 2005, p. 991 entitled *Children in the Crossfire.*

In one study, the researchers looked at spouse abuse issues in all divorces in Seattle, Washington from 1998-1999. They did not look at child abuse issues. They found that mothers who suffered interpersonal violence (IPV) were no more likely to be awarded custody than other mothers without IPV. Fathers with known histories if IPV were more likely to be denied visitation, but that still only represented 17% who were denied visitation. In half of the cases with court or police documented domestic violence (DV), that history was not in the divorce file.

The study concluded that interpersonal violence (IPV) was ignored even with a documented, substantiated history and strong protections for the children were not put into place.[10] As many as 20% of the victims reported returning to the abuser because of threats made about taking the children.

A second study looked at outcomes when the fathers had protection orders against them.[11]

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[10] Child Custody Determinations among Couples with a History of Intimate Partner Violence, p. 991, Kenic, Monrary-Ernsdorff, Koepsell, Holt in *Children in the Crossfire.*

[11] *Outcomes of Visitation and Custody Petitions when Fathers are Restrained by Protection Orders: The case of the New York City Family Courts*, Rosen and Sullivan, National Institute of Justice Grant no. 1998- IJ-CS-0021, secondary analysis of data, p. 1054.

There was no statistical difference in outcomes for fathers and mothers when filing custody or visitation petitions. They found that contrary to popular thought, fathers restrained by orders of protection (OPs) were more likely to obtain visitation orders than not (64%). More than 50% threatened to kidnap the child, 40% threatened to kill the mother and in 44% of the cases, the children were physically involved in the violence.

The researchers found that the State of New York could and did charge mothers with failure to protect if children witnessed violence. But if the mothers separated from the fathers to avoid the child witnessing violence, fathers asked for and got custody or visitation and the children and mothers were abused yet again during the exchanges and visits.

This is precisely the situation with Titelman. If she had not reported the abuse and acted to protect the children, she would have been liable for failing to protect the children. But when she took action to protect them, she was arrested and punished by losing all contact with the children thus putting them into even greater danger.

It was found that no fathers restrained by OPs who asked for custody and appeared at trial were denied custody or visitation in family court. Thus safety considerations were obviously not being considered in custody determinations.

Paradoxically, the data showed that fathers were more likely to get visitation when an OP was

granted (64%) than when it was dismissed (49%). Also in 58% of those cases, father's custody petition was also dismissed indicating that fathers filed custody to coerce mothers into dropping OP petitions. If mothers want to protect their children, they have to not protect themselves. Even when there were two orders – OP and visitation order – the OP was limited by the visitation order rather than the visitation order being limited by the OP. Thus the "right" of the father for visitation was a higher ranking right than the right of the mother or child to be protected from physical violence. The researchers concluded that the courts are failing to protect women from victimization and children from exposure to violence. The court itself may become the instrument by which abusive fathers continue to have contact with and abuse partners.

One study directly studied the effectiveness of statutes mandating that the court have a presumption against custody to the perpetrator and that judges have education about the issue of domestic violence.[12] When there was a presumption against custody to a perpetrator, more custody decisions gave custody to the mother unless there was also a friendly parent provision and a presumption for joint custody in the law. Under those conditions, courts granted joint custody twice as often in states with a presumption against the

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[12] Child Custody and Visitation Decisions when the Father has Perpetrated Violence against the Mother, Morrell, Dai, Dunn, Sung, Smith, National Institute of Justice Grant 1999-WT-VX-0013, *Children in the Crossfire*, Sage, p. 1076.

perpetrator but also competing presumptions of friendly parent and joint custody as those with no presumption against DV at all. So in those states, it appears that reporting DV punishes the victim of abuse rather than protects her.

Some judges actually believed there was no situation that could justify restricting the fathers visitation. Thus the right to life and security of the mother and child were violated as the fathers parental rights were elevated into a higher position.

The situation is no better with mediators who work in family court. Mediators failed to recognize and report DV in 57% of the cases, even when DV was on the court screening form. The screening form itself failed in 15% of the cases. Even when there was a protection order, mediators recognized DV in only 49% of the cases. Even when there was both DV in the court screening form and a protection order, mediators recognized DV in only 49% of the cases.[13] This level of failure cannot be put down to ignorance or negligence but must be willful disregard.

Contrary to common belief, violence against a woman and her children does not stop when she leaves the abuser. In fact separation often leads to an escalation of the violence and greater danger. In

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[13] *Violence Against Women*, No. 11, Volume 8, Sage, 2005, Child Custody Mediation in Cases of Domestic Violence, Johnson, Saccuzzo, Koen, p. 1022, National Institute of Justice Grant No. 1999-WT-VX-0015.

spite of that, the father-child relationship is privileged as more important than the danger to the child.[14] Often the request for custody of the children has more to do with attempting to force the mother to reconciliation or to punish her for refusing than over care about or concern for the child's best interest.

In fact, research has found that 75% of men who abuse their female partner also abuse their children. Girls run a higher risk – they are 6.5 times more likely to be sexually abused than girls from non-violent homes. They are particularly susceptible to sexual abuse when the marriage is ending. The belief that mothers and children make false allegations of child sexual abuse during custody proceedings has been shown to be simply not true. Mothers were no more likely than fathers to make false allegations. In fact, 21% of father's allegations were shown to be false compared to only 1.3% of mothers.

One national survey of non-abusive parents showed that 65% of the parents trying to protect their children were advised by attorneys, mediators, court personnel, advocates, police, psychologists, family court advisors, other protective parents and even one judge not to report the abuse. Although 90% of the non-abusive

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[14] Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes, Jaffee, Crooks, and Poisson, 57 Juvenile and Family Court Journal Fall 2003.

mothers reported that they began with custody of their children, by the end of the court process 80% of the identified offender fathers had custody, 29% of the mothers were placed on supervised visitation, and 29% of the mothers had no contact at all with their children. In most cases, the fathers who plea for sole custody are the same fathers who abuse their wives and children.[15] This is a clear denial of due process, access to court and the right to petition the courts for the protection of fundamental rights.

While one would hope that experts appointed by the court would be aware of the issues involved in the best interest of the child, this is simply not so. Forty percent of those working in mental health fields in the U.S. have received no training about partner violence and fewer received training about child sexual abuse. A study by Bancroft and Silverman showed chronic problems with custody evaluations done by unqualified evaluators.[16] Evaluators often blame the victim for not leaving the abusive situation and label her as unfit or unstable. They then turn right around and recommend custody to the violent parent. One study gave therapists a case study of an actual domestic violence situation that resulted in the

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[15] Geraldine Stahley, Oral presentation at the Western Psychological Association meeting in Canada, May 2003.

[16] Bancroft, Lundy R., *Understanding the Batterer in Custody and Visitation Disputes*, 1998. *Placing Children at Risk: Questionable Psychologists and Therapists in the Sacramento Family Court and Surrounding Counties*, investigative reporter Karen Winner, May 15, 2000.

murder of the woman. The study found that 91% of therapists failed to even identify the abuse. Of the 9% who recognized it, 40% of them did not think it was important.

Studies have also shown that even when confronted with the child's disclosure of abuse, less than 50% of mothers took action. For those mothers who did, the most frequent action was a divorce. However, that is precisely when the court and child protective agencies do not believe the mother or child. Rather than understanding that abuse motivated the divorce, they believe the divorce motivated the abuse allegation. Those children who were believed about the abuse suffered much less emotional and behavior problems. But when the mother believes the child and takes action, she is at most risk of losing custody or visitation all together.[17]

Mothers are in a no win situation - if they do not protect the child, they are accused of failing to protect but once a divorce is filed, suddenly the viewpoint is reversed and if she tries to protect, she is instead accused and likely to lose her children.[18]

C. Violation of due process and equal protection in the family law courts resulting in custody

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[17] Palmer, Brown, "Responding to Disclosures of Familial Abuse: What Survivors Tell Us", *Child Welfare Journal of Policy, Practice and Program*, Mar/Apr 1999.

[18] Hofford, Merry, M.A. et al. "Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice." *29 Family Law Quarterly*, 1995, 201-02.

to abusers is a widespread practice across the U.S.

Several qualitative studies have been done to document this pattern of bias against mothers and the states failure to protect children. Battered Mothers Speak Out, a report published by the Battered Mothers Testimony Project (BMTP) at Wellesley College in November 2002[19] documents the human rights violations battered women suffer when they fight against their abusers for custody of their children in the Massachusetts family courts. Since 1999, project co-directors interviewed 40 battered mothers with experience in 11 of Massachusetts' 14 counties. Said Cuthbert, "Despite their diversity, the problems that they identified were remarkably similar. The courts fail to protect battered women and children by issuing child custody rulings that endanger them. Family courts give custody to batterers. Child abusers are given unsupervised visitation. Women and children are required by the courts to interact with their abusers with no protection."

In court, women are often at a disadvantage. A law that could provide critical protection—the Massachusetts Presumption of Custody Law that affirms that the children's best interests are not served when they are placed in the custody of a batterer or child abuser is not regularly enforced. Women usually receive custody in uncontested cases, but the 1989 gender bias study commissioned

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[19] Wellesley Center for Women, Women's Rights Network, Wellesley College.

by the Massachusetts Supreme Judicial Court found that fathers win three times more often than mothers in contested custody battles.

In a very different state, the Arizona Coalition Against Domestic Violence carried out a two year study of 57 women who had gone through a custody battle in Arizona family courts.[20] The Arizona study's main findings were:

a. In spite of evidence of violence against women and/or their children, (and with such violence documented in 63% of the cases) the courts consistently ordered sole or joint custody to perpetrators in 74% of the cases in Maricopa County and 56% of the cases in the other counties combined.
b. Income level, which was highly skewed towards father, seemed to have the most impact on the ultimate custody decision.
c. Having a custody evaluator more likely resulted in the mother losing custody.
d. By and large, the systems of control the perpetrator established pre-divorce, including physical and sexual violence and child abuse, were maintained post-separation with the added ability to use the court system to abuse the victims.
e. Having an order of protection had no impact on the final custody decision;

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[20] Battered Mothers' Testimony Project: A Human Rights Approach to Child Custody and Domestic Violence, Arizona Coalition Against Domestic Violence, June 2003.

contrary to Arizona law, the courts simply ignored the documented existence of domestic violence.

f. The courts ignored well-known research and federal standards as 100% of the victims were ordered to go to mediation or a face-to-face meeting with the abuser.
g. A large number of perpetrators had weapons or used alcohol or drugs when with children.

In the same year, a study was released regarding the domestic relations division of the Philadelphia Family Court.[21] While the methodology was different, the findings were equally horrific.

In California, the California Protective Parents Survey project collected questionnaires nationally from September 2001 to December 2004 and netted 164 responses nationally and 93 in California. For both groups, 83% of the primary caretakers had primary custody at the beginning of the litigation. Mothers initiated litigation in 63% of the cases in CA and 61% of the cases nationwide. The main issue was child custody and visitation (94%). The mothers alleged the fathers had substance abuse issues (69% CA, 65% US); a criminal history (55% CA, 52% US); the mother was a victim of domestic violence (88%); allegations of child abuse arose

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[21] Justice in the Domestic Relations Division of the Philadelphia Family Court: A Report to the Community, Women's Law Project, Philadelphia, Pa, April 2003.

during the litigation (91%), 71% was physical abuse and 65% sexual; and the father threatened to take the children if the mother left (74% CA, 78% US). Medical or physical evidence was submitted by the mother in 60% of the cases, other corroboration was presented in 80%, and the child identified the father as the perpetrator (74%). The evidence was ignored by the court (97%). Though 88% of the mothers reported they were victims of domestic violence, the mother was advised not to mention domestic violence or child abuse in court (67% CA, 64% US) and was advised by her attorney that pursuing court action would harm the case (62% CA, 57% US). Custody was changed over mother's objection or in an emergency hearing (70%). The most potent reason for custody to change to the father was an allegation of child abuse (67% CA, 62% US).

After litigation, 19% of the mothers had primary custody yet 71% of the children continue to report abuse by the father. The mother was herself restricted from all contact with the child at some point (60% CA, 55% US). She was put on supervised visitation at some point (51% CA, 44% US). Parties were ordered to mediation (91% CA, 75% US). A child custody evaluator was selected by the court (86%). PAS was specifically used against mother (40% CA, 41% US) or Gardner quoted (16%) or the term "alienator" used (27% CA, 29% US). The mothers felt the result was due to discrimination (97%), unethical behavior (74-80%), gender bias (68-70%), and fathers having more money (64-65%). Though nearly a third of mothers spent over $90,000 on the case and had to file

bankruptcy, for nearly 80% of the litigants, the case continues. The mothers felt due process was violated by the inability to present her case, inadequate or incomplete transcripts, insufficient time, no attorney, mother threatened, *ex parte* hearings, refusal to allow mother to see evaluations and transcripts, and no reporter at the hearing so an appeal was not possible (55-88%).

The resulting situation has left fathers with full custody even when he was identified as the perpetrator of violence (41% CA, 40% US); mother has no contact with the child (22% CA, 21% US); mother has supervised visitation (18%); they have joint custody (22%); mother has primary custody (16% CA, 19% US), father has supervised visitation (7%). The children continue to report abuse (74% CA, 71% US) but mother is unable to protect the child (82%) because she fears that reporting abuse will result in her contact with the child to be terminated (56% CA, 60% US). In California, in 85% of family law cases, at least one party does not have an attorney. [22]

These studies are from such disparate states as Massachusetts, Arizona, Pennsylvania and California as well as national data. Yet the findings are disturbingly similar. Documented domestic violence and child abuse is ignored, due process is violated, and discrimination is rampant. This deep and broad denial of the rule of law must

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[22] www.courtinfo.ca.gov/programs/cfcc/programs/description/flic.htm

be rectified by the highest court or make a mockery of justice.

II. PARENTING IS A FUNDAMENTAL RIGHT UNDER THE CONSTITUTION AND DUE PROCESS MUST BE ACCORDED PURSUANT TO THE FIFTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION.

A mothers' right to conceive and raise her children is one of the "basic civil rights of man".(sic) A mothers' right to retain custody over and care for her children and to rear her child as she deems appropriate is one of the most fundamental rights in and to our society. (*Campbell v. Burt*, 949 F.Supp. 1461, 1466 (D.Hawaii 1996)). In addition, both a mother and a child have a constitutionally protected liberty interest in the companionship and society of their relationship. (*Woodrum v. Woodward County, Okl.*, 866 F.2d 1121 (9th Cir. 1989)). This interest in familial integrity has long been recognized by the United States Supreme Court, which stated in *Roberts v. United States Jaycees*, 468 U.S. 609, 619-20, 104 S.Ct. 3244, 3250, 82 L.Ed.2d 462 (1984), "Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom we share not only a special community of thoughts, experiences, and beliefs but also distinctive "personal aspects of one's life." More recently, the Ninth Circuit Court of Appeals recognized that the right to familial integrity extends to both the parent and the child when it stated: "The companionship and nurturing interests

of parent and child in maintaining a tight familial bond are reciprocal, and we see no reason to accord less constitutional value to the child-parent relationship than we accord to the parent-child relationship." (*Smith v. City of Fontana*, 818 F.2d 1411, 1418 (9th Cir. 1987)). Other federal circuits also recognize that the right to familial integrity is shared by both parents and children. (*Duchesne v. Sugarman*, 566 F.2d 81, 825 (2d Cir. 1977)). 'This right to the preservation of family integrity encompasses the reciprocal rights of both parent and children. It is the interest in the companionship, care, custody and management of his or her children, and of the children in not being dislocated from the emotional attachments that derive from the intimacy of daily association with the parent.". In this particular case, the child's rights to their mother's association have been violated as well as the mother's rights to the children's. However, as the research above shows, often the mother who alleges domestic violence or child abuse ends up losing custody all together and may never see her children again or can only see them in very restrictive situations.

Before a mother or child is deprived of a protected liberty interest, he or she "must be afforded an opportunity for some kind of hearing, except for extraordinary situations where some valid governmental interest is at stake that justifie[s] postponing the hearing until after the event." *Dykes v. Hosemann*, 743 F.2d 1488, 1494 (11th Cir.1984). At the very minimum, due process requires timely notice in advance of a hearing in which parents' rights to custody are at stake.

Dykes, 743 F.2d at 1494. Yet in this case as is common in so many cases, hearings were held with 24 hour notice and *ex parte* hearings were common. The common research finding that custody decisions are often made after 5-10 minute hearings is shocking when at issue is the safety and often literally the life of a child.

An extraordinary situation must exist before a child can be taken from a mother without a prior hearing. Such emergency situations "mean circumstances in which the child is immediately threatened with harm" and not "[t]he mere possibility of danger." (*Nicholson*, 203 F.Supp.2d at 237 (quoting *Tennebaum v. Williams*, 193 F.3d at 594 (2d Cir. 2001). If the danger is not imminent, then there is no excuse to deny a hearing with participation from both sides. Thus the court violated the mother and children's due process rights when taking the children from her when in fact she was protecting the children and when so severely restricting her visitation rights as to in fact make them impossible. Again this pattern emerges again and again in the stories of custody cases across the nation. Penniless mothers who have never abused their children are forced to pay large sums of money to supervisors, evaluators, parenting coordinators and assorted court adjunct personnel for the "right" to see their own children.

Even in the rare situations when a mother is not entitled to prior judicial review, "their parental due process rights are merely postponed, not nullified", and such mothers are "entitled to prompt post-deprivation judicial review." (*Campbell v.*

Burt, 949 F.Supp. 1461, 1467 (D.Hawaii 1996)). The cases vary on what they say is prompt. The Fourth Circuit stated that a delay of 72 hours is on the outer limits. (*Campbell*, 949 F.Supp. at 1467). The *Campbell* court held that a one-week delay violated procedural due process. (*Campbell*, 949 F.Supp. at 1468; *see also Hebein ex re Berman v. Young*, 37 F.Supp.2d 1035 (N.D. ILL 1998). In this case it has been five years. Again this is not uncommon in cases that continue for years bankrupting the protective parents.

The standard for determining if due process is violated requires the court to weigh "'the importance of the private interest and the harm to this interest occasioned by delay; the justification offered by the Government for delay and its relation to the underlying governmental interest; and the likelihood that the interim decision may have been mistaken.'" (*Campbell*, 949 F.Supp. at 1468 (quoting *FDIC v. Mallen*, 486 U.S. 230, 108 S.Ct. 1780, 100 L.Ed.2d 265 (1988)). In weighing these interests "[i]t is clear that the private, fundamental liberty interest involved in retaining the custody of one's child and the integrity of one's family is of the greatest importance." (*Duchesne v. Sugarman, supra*) holding that a 36 month delay violated due process). The private interest in these cases is the most important one can imagine – contact with ones own child. Many parents value their children more than life itself. Yet again and again as research has shown and literally hundreds of actual cases have demonstrated, protective parents who act in the most basic ways to protect their children

are not only prohibited from doing so but are punished by the courts for trying.

Inherent in all of these due process rights is the right of an individual to have adequate, effective and meaningful access to court procedures. This right of access is sometimes found to be grounded in Article IV of the Constitution and sometimes under the Fourteenth Amendment due process clause. (*Chrissy F. By Medley v. Mississippi DPW*, 780 F.Supp. 1104, 1120 (S.D. Miss. 1991). "The right to present a claim to a court of law is basic to our system of government, and is, consequently, one of the most fundamental rights protected by the United States Constitution." (*Medley*, 780 F.Supp. at 1119.231). In this case by ordering a half million dollar bond, the Georgia court has effectively prevented the petitioner from having adequate, effective or meaningful access to court procedures. When a litigant is advised not to tell the court about violence toward herself or a child, that is denial of access to court. When a litigant is prohibited from filing motions about violence against her or the child, that is denial of access to court. When judges refuse to listen to documented proof of domestic violence or child abuse, that is denial of access to court. Access to court must mean more than being able to walk through the door. It must mean being heard. In family law courts today, allegations of domestic violence and child abuse are not being heard. In spite of state law, in spite of education, in spite of a Congressional resolution, in spite of the National Council of Juvenile and Family Court Judges, in spite of the American Bar Association, judges

routinely refuse to hear or credit violence against women and children.

III. PARENTING IS A FUNDAMENTAL RIGHT UNDER THE CONSTITUTION AND EQUAL PROTECTION MUST BE ACCORDED PURSUANT TO THE 14TH AMENDMENT OF THE CONSTITUTION.

A mother and child must be treated equally under the Fourth, Ninth, and Fourteenth Amendments to the U.S. Constitution. Treating them differently under a state law or practice because of their status as victims of domestic violence or treating the mother differently because of her gender violates their rights, unless the state can give an appropriate reason that satisfies the constitutional standard. Distinctions in gender "must serve important governmental objectives and must be substantially related to the achievement of those objectives." *Hynson v. City of Chester Legal Dept.*, 864 F.2d 1026, 1029 (3rd Cir.1988); see *U.S. v. McClelland*, 72 F.3d 712, 717 (9th Cir. 1995). In addition, the analysis of the distinction must not apply "'traditional, often inaccurate, assumptions about the proper roles of men and women,'" and must not allow the distinction to perpetrate "'archaic and stereotypical notions.'" *Hynson*, 864 F.2d at 1029).

Distinctions in the law against women and children who are victims of domestic violence require the state to provide a rational justification of how the legislation or practice is related to legitimate governmental objectives. *McClelland*, 72

F.3d at 717. Although this standard is not as stringent as that for gender distinctions, "the rational-basis standard is 'not a toothless one.'" *McClelland*, 72 F.3d at 717. If the law or policy is stated in a neutral manner and is not discriminatory on its face, the law or policy may still be unconstitutional if it is applied in a discriminatory manner. *McClelland*, 72 F.3d at 716; *Hynson*, 864 F.2d at 1030; *Hayden v. Grayson*, 134 F.3d 449, 453 (1st Cir. 1998); *Ricketts v. City of Columbia, Missouri*, 36 F.3d 775, 781 (8th Cir. 1994)

The court in this case has followed the pattern and practice that has been identified throughout the U.S. This case follows the pattern established by research across the nation that shows clearly that abused women are treated differentially and negatively in court and that abused children are likewise not given the protection that is mandated under state statute and their Constitutional rights.

CONCLUSION

The failure to protect children in the family courts is not a new phenomenon or an isolated one but has existed since at least the 1960s. This failure is not limited to one court or one district or one state but is a national tragedy. The practice continues in spite of law suits and legislation, education and political activism. The result is rampant discrimination against women and children and violation of their most basic human rights to family, to equality, to due process and most importantly to safety. Amici ask this court to

grant the writ of certiorari and hear the case on the merits with oral argument because of its tremendous importance to the health and lives of parents and their children across the country.

Amici Curiae urges this Court to grant certiorari to address the trial court's *de facto* termination of Wendy Titelman's parental rights and make clear that the due process and equal protection violations in this case must not be tolerated.

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